No. 470.

Motion Papers for Appls.

Filed Oct. 30, 1897.

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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

No. 470.

GEORGE J. CROSSLEY (Petitioner on behalf of Salter D. Worden), and SALTER D. WORDEN, Appellants,

vs.

THE STATE OF CALIFORNIA AND CHARLES AULL, Warden of the State Prison of the State of California, Appellees.

Objections of Appellants to Appellees' Motion to Advance the Case on the Docket.

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Objections of Appellants to Appellees' Motion to Advance the Case on the Docket.

Now comes George J. Crossley and Salter D. Worden, the appellants in the above-entitled case, and object to the motion herein made and filed to advance this cause upon the docket, and setting the same down for hearing on a particular day, on the following grounds, to-wit:

1. Because the said motion is misleading and is based upon an erroneous allegation of fact.

2. Because the immediate advancement of said case will under the circumstances of this case and of the appellants amount to a practical denial of justice, and will prevent the appellant Salter D. Worden from presenting his case so that it can be heard upon the merits thereof.

These objections are supported and based upon the affidavits of Geo. J. Crossley and Geo. W. Monteith herewith filed and hereunto attached, reference being hereby made thereto and said affidavits being made part of these objections.

And in making and filing these objections these appellants hereby consent to an advancement of this cause to any date after the 15th day of March, 1898, at which time they expect to be fully able to have their case ready for presentation to the court.

Wherefore, these appellants earnestly pray that this honorable court make no order advancing this case for hearing at an earlier date than the 15th day of March, 1898.

(Signed) Isaac J. Maccabee,
Attorney for Appellants.

Dated San Francisco, California, October 23d, 1897.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1897, No. 470.

GEORGE J. CROSSLEY (Petitioner on behalf of Salter D. Worden) and SALTER D. WORDEN, Appellants.

vs.

THE STATE OF CALIFORNIA and CHARLES AULL, Warden of the State Prison of the State of California, Appellees.

Affidavit of George J. Crossley in support of appellants' objections to motion to advance.

State of California, } ss.
City and County of San Francisco. }

George J. Crossley, being first duly sworn, upon his oath deposes and says:

That he is one of the appellants above-named; that ever since the commencement of this action in the Circuit Court, George W. Monteith, Esq., has been the counsel and attorney for the affiant and the other appellant, Salter D. Worden, the person in whose behalf this cause was instituted, and has been employed by the appellants to appear for them and represent them at the hearing of this cause when the same shall be finally heard by the Court; that appellants are both poor persons and wholly without means, and have been obliged to depend upon the generosity and assistance of the friends of appellant Worden to prosecute this case as far as it has gone, and will still be obliged to depend upon them and upon the brother of said Worden to raise the funds that are necessary to pay the costs and expenses of prosecuting this appeal; that the brother of the said Worden is located in Yokohama, Japan, and, as affiant is informed and believes, will be able to render part of the assistance necessary to prosecute this appeal, and furthermore affiant states that subscriptions are being taken up among the labor organizations and friends of Worden for the same

purpose; that affiant has good reason to believe and fully does believe that if a reasonable amount of time be afforded the appellants that they will be able to obtain whatever funds are necessary to prosecute the appeal herein, and fully present the same upon a hearing thereof, if such hearing be had at a time not earlier than the 15th day of March, 1898; that owing to the amount of time that will be necessary to secure the subscriptions required and to communicate with the brother of the said Worden, at least four or five months' time will be required.

That Isaac J. Maccabe, who appears as attorney for appellants, only temporarily represents them, and as he resides in San Francisco, California, cannot be present at the hearing of appellees' motion to advance noticed for November 1, 1897;

That appellants have taken this appeal in entire good faith and have been advised by their counsel, who has by them been fully informed as to the facts, that their appeal is well taken in point of law, and presents questions that will warrant the reversal of the judgment of the said Court;

That appellants have no desire to in any way retard or delay the prompt disposition of this case; but, on the contrary, are both willing and anxious to expedite its hearing so far as the same can be done without jeopardizing the material interests of the appellant Worden, which involve his life;

Wherefore, this appellant and affiant earnestly prays that if this Honorable Court in its judgment shall deem an advancement of the case just and proper, that the time of hearing be fixed at a date not earlier than the 15th day of March, 1898.

(Signed.) Geo. J. Crossley
One of the Appellants.

Subscribed and sworn to before me this 23d day of October, 1897.

(Signed.) Addie L. Ballou,
Notary Public in and for the City and County of San Francisco and State of California.

(Official Seal.)

State of California, }
City and County of San Francisco. } ss.

George W. Monteith, first being duly sworn, deposes and says: That he is the attorney and counsel of the appellants herein, who has appeared for and represented them up to the filing and docketing of this cause; that, although he is still their counsel, not having as yet been enrolled and admitted to the bar of the Supreme Court, has been unable to appear in that court in their behalf, and has been obliged to secure other counsel to temporarily represent them until he would be able to attend the Supreme Court, and be regularly admitted, affiant being fully qualified and entitled under the rules of the court upon proper motion and with the consent of the Court to be so admitted;

That affiant has charge of the interests of appellants, so far as it is now possible for him to attend to them, and knows all the facts and circumstances of the case, and being a regularly licensed attorney and counselor at law, practicing in and being admitted to all the courts of the state of California, the United States Circuit Court of Appeals and the United States Circuit Court, each of the Ninth Circuit, and fully qualified to judge thereof, has advised the appellants, and fully believes and is convinced, that the appeal herein is meritorious and well taken in point of law, and will warrant a reversal of the judgment of the Circuit Court:

That affiant has read the affidavit of W. H. Anderson in support of the motion to advance; that the same is erroneous in the following particulars, to-wit:

That while it is true that appellants have applied for habeas corpus herein, they also and at the same time applied for an ancillary writ of certiorari, the latter to be directed to the Superior Court of Yolo County, California, wherein lies the record in the case upon which the appellant Worden was convicted of murder, and was, for the purpose of bringing before the Circuit Court such record, in that defects of jurisdiction complained of, and because of which the writ of habeas corpus was sought were latent, and appeared upon the record of said Superior Court lying back of the judgment of that court, and not being patent upon the commitment by which the said Worden is held in custody, or

in the judgment it recites, required the added process of certiorari to bring the whole question of the unlawful custody on the part of the appellees complained of before the Circuit Court;

That, by reason of the laws of the State of California, under which appellant Worden was convicted, the crime of murder is divided into two degrees, to-wit, murder in the first degree and murder in the second degree; that section 189 of the Penal Code of the State of California, the law under which appellant Worden was convicted, reads as follows:

"Section 189. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, is murder of the first degree; and all other kinds of murders are of the second degree."

That the facts, as they appear in the record of said Superior Court and in the bill of exceptions, which is a part thereof, show no evidence of any willful ,deliberate and premeditated intent to take human life; but that the malicious intent, as shown by said record ,is purely by implication of law and arising from the commission of a felony other than any of the five expressly by law made the basis of the crime of murder in the first degree.

That section 187 of said Penal Code defines murder as follows:

"Section 187. Murder is the unlawful killing of a human being with malice aforethought."

And section 188 of said Code says: "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

That, by reason of the laws of California, aforesaid, murder in the first degree, other than that committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, only occurs where the malice is express and not implied from the fact of the presence of a purpose or design to commit some other felony;

That appellant Worden, as appears in the record of said Superior Court, was shown to have so injured the track and roadbed

of a railroad that a train was derailed and the engineer was killed; but there is no evidence in the record showing any express purpose on the part of appellant Worden to take the life of said engineer, or of any other fellow-creature, and the only malice that could be determined by the facts as appear in the record of said Superior Court was implied malice, implied from the fact of the commission of a felony, to-wit, the wrecking or attempt to wreck a train; and under the law of California, therefore, the record of said Superior Court at most shows a case of murder in the second degree;

That, by the laws of California, murder in the second degree is punishable by imprisonment only, while murder in the first degree may be punished by death;

That, as it appears in the record of said Superior Court, the Court only submitted to the jury the question of murder in the first degree on the one hand, or acquittal on the other; that, by reason of such action on the part of said Superior Court, the jury returned a verdict of murder in the first degree, and appellant Worden was thereupon sentenced to be hanged, and by the appellee, the State of California, acting through its Superior Court aforesaid, placed in the custody of appellee Aull for the purpose of having him hanged by the neck until dead, and the custody of the said Worden is for that and no other purpose;

That appellant Worden appealed to the Supreme Court of the State of California in that behalf, and his appeal was denied; that he also made application to the Governor of said State for relief, which was refused, and that there is no relief which he can seek in the State of California, either in its courts or otherwise, which will prevent the State of California taking his life in a case wherein the facts, under the laws of said State, at most warrant his imprisonment;

That, by reason of the premises, the appellant Worden has been denied by the appellee, the State of California, of the equal protection of its laws, and has by said State been convicted and about to be deprived of his life through the unlawful custody in which he is held, without due process of law;

That the statement contained in the affidavit of the said W. H. Anderson, to-wit, "That there are three other cases of a similar nature now pending in this Court," is erroneous, in that

the questions presented by the other cases, as affiant is informed and believes, are wholly and radically different, and relate solely to such questions as can be raised upon and are patent from an examination of the commitment in each of the three cases referred to by the said Anderson;

That so far as affiant is informed and believes the three cases referred to by the said Anderson are those of one Durrant, one Allender and one Hill; and affiant is further informed and believes that the commitments in those cases are regular and present no patent defects of jurisdiction, and the appeals in those cases are, in truth, frivolous and without merit, while, in the case of appellant Worden, the appeal presents a plain and meritorious question under the 14th amendment of the Constitution of the United States, and is based upon latent defects of jurisdiction, which do not appear upon the face of the commitment but which he seeks to reach by the ancillary writ of certiorari in aid of that of habeas corpus.

That the affidavit of the said Anderson is misleading, erroneous and would, unless contradicted, tend to prejudice the appellant Worden before this Honorable Court, in that the statement in the affidavit of the said Anderson unchallenged might lead the Court to believe that the appeal of the said Worden was of the same frivolous and unwarranted character of the other appeals referred to;

That affiant earnestly and sincerely believes that the appeal of the appellants in this case is meritorious and entitles them to the relief they seek;

That it is the purpose of appellants to in good faith and as rapidly as possible bring this appeal on for hearing; but from his intimate knowledge of the circumstances and conditions of these appellants and of the case, he does not think it will be possible for them to fairly present their cause before the Supreme Court before the 15th day of March, 1898.

(Signed) Geo. A. Monteith

Subscribed and sworn to before me this 23rd day of October, 1897.

(Signed) Addie L. Ballou

Notary Public in and for the City and County of San Francisco and State of California.

(Official Seal)